

Singh (Migration) [2024] AATA 503 (14 March 2024)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Uttambir Singh
REPRESENTATIVE:	Ms Carina Ford, Carina Ford Immigration Lawyers
CASE NUMBER:	2103259
HOME AFFAIRS REFERENCE(S):	BCC2019/2221117
MEMBER:	Amanda Mendes Da Costa
DATE:	14 March 2024
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Skilled Regional Sponsored (Provisional) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 489 - Skilled - Regional (Provisional) visa: • Public Interest Criterion 4020 for the purposes of cl 489.211(1) of Schedule 2 to the Regulations

Statement made on 14 March 2024 at 1.05pm

CATCHWORDS

MIGRATION – Skilled Regional Sponsored (Provisional) (Class SP) visa – Subclass 489 (Skilled - Regional (Provisional)) – false or misleading information or bogus document – employment history – border force and federal police investigation showed employer operating pay-for-visa scheme – education, employment, successful skills assessment and documentation – ceased employment before period of scheme – remittals of similar decisions not binding – decision made without hearing necessary – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), ss 5(1), 65, 360(2)(a), 376
Migration Regulations 1994 (Cth), Schedule 2, cl 489.211(1), Schedule 4, criterion 4020(1), (5)*

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 24 February 2021 to refuse to grant the applicant a Skilled Regional Sponsored (Provisional) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 23 April 2019. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 489.211(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the applicant did not meet the requirements of Public Interest Criterion (PIC) 4020(1).
6. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of the applicant based on the material before it, pursuant to s.360(2)(a) of the Act.
7. The applicant was represented in relation to the review.
8. The documents provided by the applicant for the purpose of the review includes the following:
 - Timesheets for applicant's part-time employment with Jerome Mobile Engineers between 29 August 2016 to 12 January 2017.
 - Bundle of timesheets for applicant's full-time employment with Jerome Mobile Engineers between 17 July 2017 to 8 June 2018.
 - Job cards for the applicant dated 31 August 2016 to 19 April 2018.
 - Skills Assessment Reports dated 3 May 2018 and 19 July 2018.
 - VETASSESS outcome letter dated 6 September 2018.
 - Discharge report dated 18 January 2021.
 - Tax returns for Jerome Mobile Engineers for the financial years 2016 to 2021.
 - Tax returns for Christy Motors for the financial years 2016 to 2021.
 - Statutory declaration of Godfrey Fernandez dated 29 November 2022.
 - Utilities bill and medical letter dated 19 July 2023.
 - Statutory declaration of Manpreet Kaur dated 18 July 2023.
 - Statutory declaration of Gurjit Singh dated 19 July 2023.
 - Written submissions, dated 11 August 2023.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 489.211(1) for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

12. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

15. Background

16. On Wednesday 11 September 2019 investigators from the Australian Border Force (ABF) and the Australian Federal Police (AFP) executed a search warrant under the *Crimes Act (Cth) 1914* at the business premises of Jerome Mobile Engineers and Christy Motors, located at 4 Paul Court, Dandenong, Victoria, 3175 (the premises).
17. Earlier surveillance activities undertaken by the investigators on 8 August 2019 and 9 September 2019, the front gates of the premises remained closed until midday. Upon entering the premises on 11 September 2019 (pursuant to the warrant) officers of the ABF and AFP observed dust covered vehicles, an unkempt workshop and no workers present, despite the search taking place during operating hours of the business. The officers further observed that the hoists were not operational, and the mechanics shop appeared to have not been functioning for some time. CCTV footage taken by the investigators showed that the five hoists in the mechanic's shop were not being utilised for mechanical purposes.
18. Whilst the investigators were conducting their investigation at the premises, a person approached the business and was questioned about their attendance at the premises. This person initially told investigators that he was attending to make superannuation payments and was found to have a large amount of money in his possession. During his discussion with the investigators, this person admitted that he was attending the premises because he had an arrangement with the business owner to provide him with employment experience for his points based skilled visa application and he was there to make his monthly payment for this purpose.
19. This person subsequently attended the offices of the ABF where he provided the following further information regarding his payment arrangement with the business owner:
 - He paid \$6,000 in cash to be paid in advance for a 12-month period of employment. The employer would only provide work experience for a 12-month period.
 - He was required to pay their own fortnightly salary of \$1,900 for full-time employment with tax and superannuation with tax and superannuation payments deducted from this amount. This left the sum of \$1,250 which was paid into his bank account as salary.
 - He was advised that if he wished to have part-time employment, he would be required to pay a monthly fee of \$650, to be paid in cash and handed to the son of the business owner. He would then be required to pay his own wage of \$920 per fortnight, which would be deposited into the business owner's account with a transaction reference of "training" or "cars". He would then receive \$750 in wages.
 - He told the investigators that he never worked on a full-time basis for the employer on either a full-time or part-time basis and the payslips generated for him by the employer were incorrect. He explained that the monthly fees he paid were for the employer to provide him with false employment claims or bogus payslips.
20. In her decision the delegate set out the above information regarding the execution of the search warrant by ABF and AFP investigators and the information obtained in the interview with the informant.
21. Based on the above information, the delegate was satisfied the employer was/is operating a payment for visa arrangement from the premises at 4 Paul Court, Dandenong, Victoria, where claimed employees of Jerome Mobile Engineers and Christy Motors pay for their false employment claims. These employment documents were then used by a number of visa

applicants (including the applicant in this case) to obtain a skills assessment for their nominated occupation and in some applications, claim points for Australian employment.

22. The delegate observed in her decision that the claimed employer's bank statements were also seized by the ABF investigators on 11 September 2019 and the evidence in the bank statements supported the earlier statements regarding deposits made by applicants to provide wages. The delegate stated that analysis had determined that large cash deposits were made directly before wages were paid, in some instances between 2016 and 2019, up to 20 employees were paid on the same day. The delegate advised the applicant that his name appeared consistently on the statements provided for November 2015 to August 2016 and that the ABF officers also sighted a tax invoice dated 25 June 2019 with payment to Godfrey Fernandez of \$2,200. This amount was for "consultation fees."
23. The delegate found:
- The information obtained by the Department suggested that cash deposits were made by the applicants to pay their own wages.
 - As the ABF reported that the business did not appear to be an operational workshop, it raised concerns that Christy Motors and Jerome Mobile Engineers would have the capacity to employ the large number of workers paid and supported the position that the business owner was operating a payment for work experience scheme.
 - This information raised serious concerns regarding his employment claims with Jerome Mobile Engineers and the genuineness of the documents provided in support of the employment claims in his visa application. The delegate said that they reasonably suspected that he may have been paying his own wages to procure a skills assessment through the Job Ready Program and work experience documents for his visa application.
 - There was evidence suggesting that he had provided a bogus document or false or misleading information in relation to the visa application to satisfy the requirements of PIC4020(1) with the result that the visa application may be refused. The delegate invited the applicant to respond (in writing) to the above matters.
24. The Tribunal notes that the applicant provided the Department with documents including employment letters from Jerome Mobile Engineers, letter to applicant from Godfrey Fernandez dated 18 November 2020, letter from the applicant's accountant, Job Ready Program Workplace Assessments, dated 3 May 2018 and 19 July 2019, written submissions, and employment reference from Truckstar Pty Ltd dated 10 November 2020.

25. **Applicant's background**

26. The applicant is an Indian national who arrived in Australia on 29 July 2013 as the holder of a student visa. Whilst living in Australia the applicant has successfully completed the following courses:
- Advanced Diploma of Leadership and Management.
 - Diploma of Automotive Technology.
 - Certificate IV in Automotive Mechanical Diagnosis.
 - Certificate III in Light Vehicle Mechanical Technology.

27. After completing his studies, the applicant commenced working at Jerome Mobile Engineers on a part-time basis as a Motor Mechanic where he was employed from 29 August 2016 until 15 January 2017. The applicant ceased his employment on 26 April 2017 when he returned to India following the death of his mother.
28. After returning to Australia in June 2017 the applicant resumed employment with Jerome Mobile Engineers on a full-time basis, working 38 hours per week. He finally ceased his employment with the business on 27 January 2019 and commenced employment (as a Motor Mechanic) with another employer. The applicant subsequently ceased this employment due to a back injury which prevented him from lifting heavy weights. The applicant is currently employed a driver.
29. During his employment by Jerome Mobile Engineers the applicant completed two on-site Trades Recognition Australia workplace assessments for the occupation of Motor Mechanic. Although he was not deemed to be job ready because of the first assessment on 3 May 2018, he successfully completed the second assessment on 6 September 2018.

30. Certificate issued by the delegate under section 376 of the Act

31. The Department's file provided to the Tribunal contains a certificate issued under s 376 of the Act on 21 July 2023 which applied to information¹ which the delegate considered should not be disclosed because it was given to the Minister or to an officer of the Department, in confidence and disclosure would result in the disclosure of lawful methods for preventing, detecting and investigating breaches or invasions of the law which would be likely to prejudice the effectiveness of those methods.
32. The Tribunal considers that the certificate is valid and that the disclosure of the information referred to was given to the Minister or an officer of the Department in confidence and that its disclosure would result in the disclosure of lawful methods for preventing, detecting and investigating breaches or invasions of the law which would be likely to prejudice the effectiveness of those methods. Accordingly, the Tribunal has not disclosed the information to the applicant or his representative.

33. Findings regarding PIC4020(1)

34. The Tribunal has considered the events detailed by the delegate in her decision regarding the execution of the search warrant on 11 September 2019 and the observations made by ABF and AFP investigators of the premises at 4 Paul Court, Dandenong. The Tribunal finds the allegation made to investigators by the unnamed informant to be serious and concerning.
35. The Tribunal considers that schemes involving visa applicants paying money in order to obtain documentary evidence of employment and work they have not actually undertaken has the potential to undermine the skilled visa program in Australia.
36. However, in relation to the applicant's potential involvement in such a scheme, the Tribunal considers the following matters support his submission that his employment was legitimate:
 - The applicant's denial of any involvement in a pay for visas scheme operated by Mr Fernandez.
 - The applicant's successful completion of a Skills Assessment on 19 July 2018, which involved him in successfully demonstrating his technical skills as a Motor Mechanic in

¹ This information is contained in TRIM reference numbers CLD2019/63472529, CLD2019/63244481, CLD2019/69104893, CLD2019/75337573, OPD2020/164803, OPD2020/165099, and BCC2019/222111.

performing tasks chosen by the assessor and the answering of questions regarding his work. The Tribunal notes that there is no evidence before it of the assessor raising any concerns about the applicant's work environment or the genuineness of his employment. The Tribunal gives this evidence significant weight in making its decision.

37. The Tribunal has further considered the job cards and time sheets, which are consistent with the applicant's full-time employment for Jerome Mobile Engineers during the periods claimed.
38. The Tribunal has considered the statutory declaration of Godfrey Fernandez; and the company taxation returns for Christy Motors and Jerome Mobile Engineers which the Tribunal has given some weight.
39. The Tribunal further acknowledges that previous review applications by other employees of Christy Motors and Jerome Mobile Engineers involving the refusal of their visa applications on the basis that their claimed employment was not legitimate, were remitted by the Tribunal (differently constituted) on the basis that they did in fact work at the businesses. However, this Tribunal Member is not bound by those decisions and has made this decision based on the evidence and submissions before it in this case.
40. The Tribunal notes that the allegations made by the unnamed informant do not make specific reference to the pay for visas scheme taking place during the period of the applicant's employment and the informant makes no specific allegations against the applicant. Whilst the Tribunal notes that the documents seized by ABF officers on 11 September 2019 included a computer printout which lists the applicant as having been paid a wage, this is not necessarily indicative of the applicant being involved in a pay for visa scheme involving Jerome Mobile Engineers .
41. The Tribunal accepts that the information obtained by ABF and AFP investigators raises doubts about the business practices of Mr Fernandez and the operation of his businesses. Whilst the Tribunal acknowledges that investigators searching the premises at 4 Paul Court, Dandenong found a file which contained the applicant's name and the words "payment records" there is no information regarding the contents of this file and the nature of any payments to which the words "payment records" apply. The Tribunal is not satisfied that there is any explicit evidence before it which links the applicant to a pay for visas scheme.
42. The Tribunal notes the delegate's concern that in his taxation return for the 2016 to 2017 financial year, the applicant gave his job description as 'Customer Service Manager which is not consistent with his claim to have been employed by Jerome Mobile Engineers during that period as a Motor Mechanic. However, the Tribunal accepts the explanation given by the applicant's accountant in his letter dated 12 November 2020 that this was a mistake made by him in completing the taxation return for the applicant.
43. Despite its concerns, the Tribunal is not satisfied that the applicant's employment with Jerome Mobile Engineers was part of a pay for visas scheme and was not legitimate. In making this finding, the Tribunal has given significant weight to the fact that the applicant's employment ceased, some three years before the execution of the search warrant on 11 September 2019. The Tribunal is not satisfied that there is a sufficient nexus between the concerns raised by ABF and AFP investigators regarding the operation of the Jerome Mobile Engineers business in September 2019 and during the applicant's period of employment, to warrant a finding that his employment was not legitimate.

44.

45. The Tribunal is not satisfied that there is evidence before the Tribunal that the applicant has:
- given or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or a Medical Officer of the Commonwealth, a 'bogus document' as defined in s 5(1); or
 - information that is false or misleading in a material particular as defined in PIC 4020(5),
46. in relation to the visa application or a visa held in the 12 months before the visa application was made.
47. Therefore, the applicant meets PIC 4020(1).
48. Based on the above, the applicant does satisfy PIC 4020 for the purposes of cl 489.211(1).

DECISION

49. The Tribunal remits the application for a Skilled Regional Sponsored (Provisional) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 489 - Skilled - Regional (Provisional) visa:
- Public Interest Criterion 4020 for the purposes of cl 489.211(1) of Schedule 2 to the Regulations

Amanda Mendes Da Costa
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...